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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERWIN ALEX GENTLE, Petitioner, v. MERRICK B. GARLAND, Attorney General, Respondent.	No. 21-1092 Agency No. A089-436-328 MEMORANDUM[*]

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted April 12, 2023[**]
San Francisco, California

Before: S.R. THOMAS and H.A. THOMAS, Circuit Judges, and RAKOFF,[***] District Judge.

Erwin Alex Gentle, a native and citizen of Belize, petitions for review of the Board of Immigration Appeals' ("BIA") decision to uphold an order by an

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[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[***] The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

Immigration Judge ("IJ") denying Gentle's application for adjustment of his immigration status and a waiver of inadmissibility. We have jurisdiction over this timely petition under 8 U.S.C. § 1252(a). And where, as here, the BIA issues a separate opinion affirming the decision of an IJ, we review the BIA's decision as the operative agency decision, along with any portion of the IJ's decision that the BIA expressly endorsed or affirmed. *See Shah v. INS*, 220 F.3d 1062, 1067 (9th Cir. 2000). We dismiss in part and deny in part the petition for review.

Gentle, who received LPR status in 2010, was convicted in 2013 of assault with a deadly weapon and sentenced to two years imprisonment. Because this made Gentile a noncitizen convicted of an aggravated felony, the Department of Homeland Security informed him in 2014 that he would be removed unless he could obtain an adjustment in his immigration status via an inadmissibility waiver under 8 U.S.C. § 1182(h)(1)(B).

While his removal proceedings were ongoing, Gentle applied for an inadmissibility waiver and adjustment of status. After a hearing on his claims, the IJ denied his applications. The IJ found that Gentle was unable to demonstrate—as noncitizens who commit "violent or dangerous crimes" are required to show—that at least one of his relatives would suffer "exceptional and extremely unusual hardship" if he were removed. 8 C.F.R. § 1212.7(d); *see also* 8 U.S.C. § 1182(h)(1)(B). The BIA affirmed this decision.

Here, Gentle challenges the BIA's affirmance on four grounds. First, he argues that the BIA did not apply the correct legal standard to his claims because it failed to consider the psychological impact that Gentle's removal would have on his relatives. Second, he contends that the BIA's conclusions regarding the financial implications of his removal for these relatives were based on erroneous factual findings. Third, he asserts that, in deciding whether to grant his adjustment application as a matter of its discretion, the BIA did not appropriately weigh the equities involved. And fourth, that the IJ violated his due process rights to a fair hearing by failing to dispose of his counsel's motion to withdraw at an earlier stage.

As a threshold matter, we must decide whether we have jurisdiction over each of Gentle's claims. As to his first claim, Gentle—by asserting that the BIA failed to consider certain factors it is *required* to consider by regulation and statute—essentially contends that the "IJ failed to apply a controlling standard governing a discretionary determination," "a question over which we have jurisdiction under § 1252(a)(2)(D)." *Mendez-Castro v. Mukasey*, 552 F.3d 975, 979 (9th Cir. 2009).

Nevertheless, we find that the BIA applied the correct legal standards and did not ignore relevant evidence. Both the BIA and IJ referenced the death of Gentle's youngest son's mother when evaluating that child's hardship and so nothing here overcomes our presumption that the agency considered the evidence in its decision. *See Szonyi v. Barr*, 942 F.3d 874, 896–97 (9th Cir. 2019).

Furthermore, the record also shows that the IJ considered the evidence of hardship cumulatively. The IJ cited the correct BIA precedent and found that "on balance," and "considering [Gentle's] situation in the aggregate," Gentle did not establish his removal would cause exceptional and extremely unusual hardship to a qualifying relative. *See Mendez-Castro*, 552 F.3d at 979–80 (holding an IJ properly considered hardship evidence cumulatively where the IJ cited and applied the correct standard, "which is all our review requires").

On the other hand, we dismiss Gentle's second and third claims for lack of jurisdiction. First, because we do not possess jurisdiction over "factual findings that underlie a denial of relief" in this context, *see Patel v. Garland*, 142 S. Ct. 1614, 1618 (2022), we cannot review the IJ's conclusion that Gentle's mother could financially support his children. We are, moreover, barred from reviewing the BIA's refusal to grant the petition as a discretionary matter, including its "weighing of the equities." *See Safaryan v. Barr*, 975 F.3d 976, 986 (9th Cir. 2020). Accordingly, we dismiss the portion of Gentle's petition that asks us to review these claims.

Finally, although we have jurisdiction to review Gentle's fourth ground of appeal—his constitutional due process claim—we find that Gentle has failed to show that the IJ violated his constitutional rights. To be sure, noncitizens do possess a right under the federal Constitution to a "full and fair hearing" in immigration proceedings, *see Reno v. Flores*, 507 U.S. 292, 306 (1993), but this right is infringed only where a petitioner can show that "the proceeding was so fundamentally unfair that the [noncitizen] was prevented from reasonably presenting his case" and that the inability to present his case "prejudiced his or her interests." *Mendez-Garcia v. Lynch*, 840 F.3d 655, 665 (9th Cir. 2016) (internal quotation marks omitted).

Petitioner falls well short of meeting that weighty standard. Though Gentle asserts that his counsel's role was "minimized" because of the IJ's failure to immediately rule on her motion to withdraw, he offers no support for this bare conclusion. As such, there is little reason to believe that the IJ's decision to withhold judgment on the motion "prejudiced" Gentle's interests or, indeed, had any impact on the outcome of the proceeding. In fact, the record belies his characterization of his counsel's role: it suggests that she provided Gentle full and fair representation despite the pendency of her motion by preparing his witnesses for testimony, objecting to adversarial evidence, and otherwise facilitating Gentle's capacity to fully "present[] his case." *See id.* At one point, Gentle's counsel acknowledged that, despite her motion to withdraw, "[i]it is still [her] responsibility to make sure that [Gentle] meet[s] [his] deadlines. . . ." Gentle, in sum, did not show that a violation of his constitutional rights infected these proceedings. We therefore deny his due process claim.

PETITION DISMISSED in part and DENIED in part.